

BONNIE DUKE, ) 3:09-cv-00739-RAM  
)  
Plaintiff, ) **ORDER**  
)  
vs. )  
)  
CITY OF FERNLEY, KELLY MALLOY, )  
TODD CUTLER, DONALD PARSONS, )  
SR., MONTE MARTIN, CURT CHAFFIN, )  
and CAL EILRICH, )  
)  
Defendants. )

This matter involves an employment discrimination action brought by Plaintiff Bonnie Duke against her former employers. Before the court are Ms. Duke's motion for summary judgment (Doc. #66<sup>1</sup>) and Defendants City of Fernley's, Kelly Malloy's, Todd Cutler's, Donald Parsons', Monte Martin's, Curt Chaffin's, and Cal Eilrich's cross-motion for summary judgment (Doc. #67). For the reasons stated below, Ms. Duke's motion is denied and the City's motion is granted.

## I. BACKGROUND

Bonnie Duke (“Ms. Duke”) is a certified public accountant. (Amend. Compl. (#49) at 2:6-12.) She has worked as a private and governmental accountant, a consultant, a finance director, and a county manager in various cities throughout Alaska and Northern Nevada. (*Id.* at 2:6-10.)

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<sup>1</sup> Refers to court's docket number.

1     **A.     *Ms. Duke Becomes Fernley's Finance Director and City Treasurer***

2             From November 5, 2001, through March 4, 2009, Ms. Duke served as defendant City of  
 3     Fernley's ("the City") Finance Director and City Treasurer. (*Id.* at 2:5-6.) Unlike other cities in  
 4     Nevada, in Fernley the offices of Finance Director and City Treasurer are combined. (Doc. #67  
 5     at Ex. 10-11.) However, despite the fact that the position has two titles, on March 21, 2007, the City  
 6     Council specified that the joint office is, in fact, "a single position." (*Id.* at Ex. 11.)

7             The office of Finance Director and City Treasurer is a nonelected position and was created on  
 8     June 6, 2001, by city ordinance 2001-0005 ("2001-0005"). In pertinent part, 2001-0005 states that the  
 9     City Treasurer and Finance Director "shall hold the office during the pleasure of the Mayor and [City]  
 10    Council." (Doc. #67 at Ex. 10.) City ordinance 2001-0001 ("2001-0001"), which passed around the  
 11    same time as 2001-0005 and created the office of City Manager, adds that the City Manager is  
 12    "authori[zed]" to "remove all non-elected officers and employees of the City except as otherwise  
 13    provided by law." (*Id.* at Ex. 17.)

14    **B.     *Ms. Duke's Office Executes its Duties, Issues Mr. Parsons' Water Bill, & Denies Parker***  
 15    ***Malloy's Request for Payment***

16             The Finance Director and City Treasurer's duties include, among other things, billing and  
 17    spending. (Pl.'s Opp'n. Summ. J. (#69) at 24-7.) As a result, during Ms. Duke's tenure, the  
 18    Treasurer's office issued water bills to Fernley residents, including defendant Donald Parsons  
 19    ("Mr. Parsons"). (Doc. #67 at 18:9; Ex. 12.) Mr. Parsons' bill, however, was disputed. A waterline  
 20    had burst, Mr. Parsons' house had flooded, his water meter had allegedly malfunctioned, and six  
 21    months later the City issued a "very large water bill." (*Id.* at 18:9-12, 19; Doc. #69 at 25:9-23.)  
 22    Attempting to negotiate the amount due, Mr. Parsons contacted Ms. Duke's staff. However,  
 23    Mr. Parsons never spoke to Ms. Duke, requested to speak with her, or had any contact with her  
 24    regarding his water bill. (Doc. #67 at Ex 1.)

25             In addition to billing, the Finance Director and City Treasurer is also responsible for  
 26    authorizing expenditures. (Doc. #69 at 25.) As a result, when Fernley resident Parker Malloy  
 27    requested compensation for videotaping a City event, Ms. Duke investigated the claim before  
 28    disbursing funds. (*Id.* at 26.) She discovered that Leslieann Hayden, a City employee with no

1 spending or contracting authority, verbally agreed to pay Parker Malloy for his services. (*Id.*)  
2 Ms. Duke, then, denied Parker Malloy's claim and informed Ms. Hayden that she was not authorized  
3 to contract for personal services on behalf of the City. (*Id.*)

4 Ms. Hayden, however, decided to pay Parker Malloy with her own personal funds. (*Id.*) But,  
5 Parker Malloy's mother, defendant Kelly Malloy ("Ms. Malloy"), refused to cash the check and  
6 requested consideration of the matter at the City Council's upcoming meeting. (*Id.*) Her request was  
7 denied. (*Id.*) Ms. Duke and Ms. Malloy never spoke about the matter or had any contact regarding  
8 Parker Malloy's services. (Doc. #67 at 26:1-2.)

9 ***C. Questions Concerning Fernley's Administration and Financial Stability Arise***

10 In late 2008 and early 2009, both Ms. Malloy and Mr. Parsons became vocal critics of the  
11 City's administration. (*Id.* at 7:5-8.) They took aim at the City Manager, Gary Bacock, and the  
12 Finance Director and Treasurer, Ms. Duke. (*Id.*) In January 2009, Ms. Malloy and Mr. Parsons ran  
13 for City Council and were elected. (*Id.* at 7:12-14.) Ms. Malloy's displeasure with Ms. Duke's  
14 performance as the Finance Director and Treasurer was a predominate feature of her campaign for  
15 office. (*Id.*) Once elected, she and Mr. Parsons continued to "criticize" and "investigate" Mr. Bacock  
16 and Ms. Duke. (*Id.* at 7:16.)

17 On January 7, 2009, Fernley's Mayor, defendant Todd Cutler ("Mr. Cutler") gave his state of  
18 the City address, in which he stated that "[t]he City's finances are strong." (*Id.* at Ex. 3.) On  
19 January 14, 2009, Mr. Bacock was replaced by a new City Manager, Greg Evangelatos  
20 ("Mr. Evangelatos"), who discovered that the City's finances were far from strong. (*Id.* at 7:19-21.)  
21 Rather, the City was approximately \$450,000 in debt. (*Id.*)

22 The City took action. In late January, Mr. Cutler, Mr. Evangelatos, Ms. Duke, and the City  
23 Council—which now included defendants Ms. Malloy, Mr. Parsons, Monte Martin, Curt Chaffin, and  
24 Cal Eilrich—conducted an audit and a series of strategic planning and budget meetings. (*Id.* at 7:24-  
25 8.) On February 18, 2009, Ms. Malloy added Ms. Duke's possible termination to the agenda of the  
26 Council's upcoming March 4, 2009, meeting. (*Id.* at 8:1-4.) Then, Ms. Malloy met with Mr. Cutler,  
27 Mr. Evangelatos, Tom Gransbery, Nevada Department of Taxation's Supervisor of Local Government  
28 Finance, and Laurel Jackson, CPA for Kafoury Armstrong, to discuss Ms. Duke's termination. (*Id.*)

1 On February 20, 2009, the City formally notified Ms. Duke of the agenda item and, pursuant to  
 2 N.R.S. § 241.033, advised her that she was entitled (1) to be present at the meeting, (2) to have an  
 3 attorney present, and (3) to present written evidence relating to her performance as Finance Director  
 4 and City Treasurer. (*Id.* at 8:19-26; Ex. 7.) Finally, on February 22, 2009, Ms. Duke allegedly  
 5 received an unsigned "hit list," reiterating Ms. Malloy and Mr. Parsons' intention to terminate her.  
 6 (Compl. (#1) at 3:12-14.)

7 ***D. The Events of March 4, 2009: Ms. Malloy Meets with Mr. Gransbery & the Fernley City***  
 8 ***Council Convenes***

9 On March 4, 2009, the day set to discuss Ms. Duke's termination, Mr. Parsons was stopped by  
 10 Lillian Perreria, a clerk in the Finance Department. (Doc. #67 at 18:27-8.) She asked Mr. Parsons  
 11 about his water bill, he expressed his concerns, and stated that he would not pay it until he spoke with  
 12 Letha Gordon, another employee in the Finance Department. (*Id.* at 19:1-6.) Mr. Parsons did not  
 13 speak with Ms. Duke or request to see her. (*Id.*)

14 Meanwhile, Ms. Malloy met with Mr. Gransbery to discuss the City's finances and a 2008 audit  
 15 report. (*Id.*) Although Ms. Duke was not present at the meeting, Ms. Duke alleges that Ms. Malloy  
 16 accused Ms. Duke of embezzlement, failing to augment the City's budget, and unlawfully borrowing  
 17 City funds. (Doc. #69 at 29:3-11.)

18 Later that day, the City Council convened. (*Id.*) Members of the public and local news  
 19 agencies gathered to watch. (*Id.*) Ms. Duke appeared with her attorney and agenda Item 8, concerning  
 20 Ms. Duke's termination, soon arose. Ms. Malloy moved to terminate Ms. Duke and Mr. Parsons  
 21 seconded the motion for discussion. (Doc. #67 Ex. 8 at 3:24.)

22 Mr. Chaffin spoke first and recommended conducting an audit before terminating Ms. Duke.  
 23 (*Id.*, Ex. 8 at 4:6-13.)

24 Mr. Eilrich spoke second. He announced, simply and cryptically, that he had made a decision  
 25 and that it wasn't easy. (*Id.*, Ex. 8 at 4:15-8.)

26 Mr. Parsons spoke third. He stated that he agreed with Mr. Chaffin and then discussed  
 27 Fernley's financial situation, including its \$450,000 debt, a dearth of transparent financial records, and  
 28 that the City recently "had to lay off a bunch of people." (*Id.*, Ex. 8 at 4-5.) Mr. Parsons concluded

1 by emphasizing that the City should be run like a business and that "accountability goes all the way  
2 to the top, all the way to the bottom . . . ." (*Id.*, Ex. 8 at 7:10.)

3 Ms. Malloy spoke fourth. She commented on the situation's gravity, discussed her accounting  
4 and auditing experience, and then listed her "concerns" with the City's finances. (*Id.*, Ex. 8 at 7:7-10.)  
5 These included: (1) "multiple habitual violations of N.R.S. § 354.626," which governs City spending;  
6 (2) the City's debt and its ability to repay it; (3) the City's "fail[ure] to control its assets such that large  
7 defalcations have occurred;" (4) the City Manager's repeated failure to consult with the City Council  
8 before amending the budget; and (5) the City's accounting failures, including its inability to distinguish  
9 between "capitol and non-capitol assets[, which] is accounting 101." (*Id.*)

10 Mr. Martin spoke last, succinctly stating his belief "that our duty is to see problems and correct  
11 problems, not nail people." (*Id.*, Ex 8 at 12:13-4.)

12 Following this discussion, both Mr. Cutler and Mr. Eilrich invited Ms. Duke to respond. (*Id.*,  
13 Ex 8 at 13:7-12.) She declined. (*Id.*) Mr. Parsons, then, invited Ms. Malloy to revise her motion and  
14 place Ms. Duke on administrative leave pending a forensic audit. (*Id.*, Ex 8 at 13:12-9.) She declined.  
15 (*Id.*) Mr. Culter, then, put the motion to a vote. (*Id.*) Ms. Malloy, Mr. Parsons, and Mr. Eilrich cast  
16 "aye's" and Mr. Chaffin and Mr. Martin cast "nay's." (*Id.*, Ex 8 at 14.) The motion passed 3-2 with  
17 no abstentions. (*Id.*) Ms. Duke was terminated. (*Id.*)

18 Following Ms. Duke's termination, local news media published reports of the event and  
19 Ms. Duke was unable to immediately find employment, despite the fact that she applied for two  
20 positions as a budget analyst with the State of Nevada. (Doc. #69 at 29:12-27.)

21 ***E. Ms. Duke Files Suit Against the City***

22 On December 15, 2009, Ms. Duke filed suit in United States District Court for the District of  
23 Nevada against the City, Mayor Cutler, and Ms. Malloy, Mr. Parsons, Mr. Martin, Mr. Chaffin, and  
24 Mr. Eilrich. (Doc. #1.) According to Ms. Duke her termination by the City was unlawful because the  
25 City Council conducted a negligent performance evaluation, Mr. Parsons violated her right to free  
26 speech, Ms. Malloy violated her right to free speech, the City Council defamed her, and the City  
27 violated 2001-0005 and 2001-0001. (Doc #49.)

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1 On August 18, 2011, Ms. Duke and the City filed cross-motions for summary judgment.  
 2 (Doc. #66; Doc. #67.) On February 28, 2012, the court held a hearing on the matter. (Doc. #77.)  
 3 During the hearing, Ms. Duke introduced one new legal theory and one new argument in an attempt  
 4 to survive summary judgment. With regard to the new legal theory, Ms. Duke argued that the City  
 5 allegedly violated Ms. Duke's liberty interest by failing to provide her with a meaningful opportunity  
 6 to respond to the City's accusations. (*Id.*) In addition, Ms. Duke introduced a new defamation  
 7 argument and asserted that Ms. Malloy defamed Ms. Duke during Ms. Malloy's March 4, 2009,  
 8 meeting with Mr. Gransbery. (*Id.*)

## 9 II. LEGAL STANDARD

10 Summary judgment is proper when the "pleadings, the discovery and disclosure materials on  
 11 file, and any affidavits show that there is no genuine issue as to any material fact and that the movant  
 12 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court views the record in a light  
 13 most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

14 If the movant initially shows that no genuine issue exists for trial, the non-movant cannot then  
 15 rest on the pleadings but must respond with evidence setting "out specific facts showing a genuine  
 16 issue for trial." Fed. R. Civ. P. 56(e). The non-moving party has the "burden of advertising [sic] to  
 17 'specific facts showing that there is a genuine issue for trial . . . .' [I]t is not the district court's job to  
 18 sift through the record to find admissible evidence in support of a non-moving party's case." *Claar v.*  
 19 *Burlington N. R.R.*, 29 F.3d 499, 504 (9th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317,  
 20 324 (1986)). When "the record taken as a whole could not lead a rational trier of fact to find for the  
 21 non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*  
 22 *Corp.*, 475 U.S. 574, 587 (1986).

## 23 III. DISCUSSION

24 Ms. Duke's second amended complaint (Doc. #49) alleges that her termination by the City was  
 25 unlawful because (1) the City Council conducted a negligent performance evaluation, (2) Mr. Parsons  
 26 violated her right to free speech, (3) Ms. Malloy violated her right to free speech, (4) the City Council  
 27 defamed her, (5) the City violated 2001-0005, and (6) the City violated 2001-0001. (*Id.*) In addition,  
 28 Ms. Duke's opposition to the City's motion for summary judgment asserts that her termination was

1 discriminatory, that the City deprived her of due process, and that Ms. Malloy defamed Ms. Duke  
2 during a March 4, 2009, meeting with Mr. Gransbery. (Doc. #69 at 4.)

3 Whereas Ms. Duke seeks summary judgment on claims five and six, the City seeks summary  
4 judgment against all of Ms. Duke's claims. For the reasons discussed below, Ms. Duke's motion is  
5 denied and the City's motion is granted.

6 **A. Ms. Duke's Poorly Pled Due Process & Employment Discrimination Claims**

7 As a preliminary matter, the court addresses Ms. Duke's muddled filings. On the one hand,  
8 Ms. Duke's arguments often read like an employment discrimination claim. (See, e.g., Doc. #69 at  
9 8-10 alleging that her termination was pretextual and illegitimate). However, Ms. Duke neither pled  
10 that she is a member of a protected class nor that she was actually discriminated against. On the other  
11 hand, Ms. Duke argues that the City violated her right to due process. (*Id.* at 8.) However, Ms. Duke's  
12 second amended complaint does not assert a due process cause of action. (See Doc. #49.) In fact,  
13 Ms. Duke's first mention of a "[p]ossible . . . [d]ue [p]rocess [v]iolation" appears in her opposition  
14 to the City's motion for summary judgment. (Doc. #69 at 1:26-7, 4:15.)

15 These claims are barred. The Ninth Circuit has held that it is inappropriate to introduce new  
16 arguments and legal theories at the summary judgment stage. *Colman v. Quaker Oats Co.*, 232 F.3d  
17 1271, 1294 (9th Cir. 2000). After a pretrial scheduling order has been entered, a party seeking to  
18 introduce new arguments or theories must amend their pleadings. Amendment requires "show[ing]  
19 'good cause' for amendment under Rule 16(b), then, . . . that amendment [would be] proper  
20 under Rule 15." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992).

21 On November 10, 2010, the court entered a scheduling order providing that the "date by which  
22 the parties shall file motions to amend pleadings or to add parties is December 23, 2010." (Sched.  
23 Order (#43) at 2:1-2.) On September 12, 2011, Ms. Duke filed her opposition to the City's motion for  
24 summary judgment, which first pled claims that can be charitably construed as employment  
25 discrimination and due process causes of action.

26 These poorly pled claims are barred because Ms. Duke has neither shown good cause to amend  
27 under Rule 16 nor that amendment would be proper under Rule 15. However, because Ms. Duke  
28



1 argued her due process claim at length during the February 28, 2012, hearing, the court notes that even  
2 if it were properly pled this claim would have failed as a matter of law.

3 Ms. Duke contends that the City's termination of her employment deprived her of a liberty  
4 interest because the City harmed her reputation and impaired her employment prospects. (Doc. #66  
5 at 8.) It is well settled that an individual has no cognizable liberty interest in her reputation;  
6 consequently, when a state actor, like the City, makes allegations that merely damage a person's  
7 reputation, like Ms. Duke's, no federally protected liberty interest has been implicated. *See Paul v.*  
8 *Davis*, 424 U.S. 693, 711-12 (1976). Indeed, defamation by the government does not deprive a person  
9 of liberty protected by the Fourteenth Amendment, even when it causes serious impairment of one's  
10 future employment. *Id.* Rather, it is only the "alteration of legal status," such as governmental  
11 deprivation of a right previously held, "which, combined with the injury resulting from the defamation,  
12 justif[ies] the invocation of procedural safeguards." *Id.*, at 708-09.

13 Ms. Duke, however, has not alleged any alteration of legal status. Even if she had, however,  
14 the court further notes that the City provided the process due because the City fully complied with  
15 N.R.S. § 241.033. *See supra* p. 4.

16 ***B. Count One: Ms. Duke's Negligent Performance Evaluation Claim is not Legally Cognizable***

17 The court now addresses Ms. Duke's first claim, alleging that her termination was unlawful  
18 because the City either failed to "dismiss [her] without evaluation . . . through [an] appraisal process"  
19 or that the City performed a negligent evaluation. (Doc. #49 at 4:18; *see also* Doc. #69 at 8 discussing  
20 this claim).

21 These claims are not legally cognizable. Ms. Duke has not cited any case or statute indicating  
22 that such a cause of action exists in Nevada. Moreover, the court's survey of both Nevada and Ninth  
23 Circuit law has not revealed a single case in which such a claim is recognized. Finally, at least three  
24 nearby jurisdictions have rejected negligent performance evaluation causes of action. *See, e.g., Walt v.*  
25 *State*, 751 P.2d 1345 (1988); *Tollefson v. Roman Catholic Bishop*, 219 Cal. App. 3d 843 (1990);  
26 *Chellsen v. Pena*, 857 P.2d 472 (Colo. App. 1992). As a result, Ms. Duke's first cause of action fails  
27 because it is not legally cognizable.

28 /// /// ///



1           However, the court notes that had Ms. Duke pled a wrongful termination cause of action, which  
 2 she did not, it would still fail as a matter of law because Ms. Duke has conceded that she was an at-will  
 3 employee. (Doc. #69 at 35:24-25); *see also* Fernley City Ordinance 2001-0005 (stating that the City  
 4 Treasurer and Finance Director “shall hold the office during the pleasure of the Mayor and [City]  
 5 Council”); *Wayment v. Holmes*, 912 P.2d 816, 818 (Nev. 1996) (“It is undisputed that [the Plaintiff]  
 6 was an at-will employee who could properly be discharged without cause at the will of the employer”).  
 7 The Nevada Supreme Court only permits wrongful termination causes of action for at-will employees  
 8 in “those rare and exceptional cases where the employer’s conduct violates strong and compelling  
 9 public policy.” *Id.* Ms. Duke has not asserted that such an exception exists here and the court cannot  
 10 discern any.

11       ***C.     Counts Two & Three: Ms. Duke’s First Amendment Retaliation Claims Fail as a Matter of***  
 12       ***Law***

13           Ms. Duke’s second and third causes of action allege First Amendment retaliation. (Doc. #49  
 14 at 6.) Again, however, Ms. Duke’s filings require preliminary interpretation.

15       ***i.     Construing Ms. Duke’s claims and filings***

16           On the one hand, Ms. Duke’s second amended complaint does not predicate either of these  
 17 claims on the First Amendment. (*See id.* at 6-7 predating these claims on “retaliation” and  
 18 “defam[ation]”). On the other hand, Ms. Duke’s complaint does predicate the court’s jurisdiction on  
 19 the First and Fourteenth Amendments. (*Id.* at 2:2.) Further, the City has construed both claims as  
 20 alleging First Amendment retaliation; and, Ms. Duke’s opposition to the City’s motion for summary  
 21 judgment does not appear to reject this interpretation. (Doc. #69 at 24-30.) Rather, at various points  
 22 in her brief, Ms. Duke characterizes these two claims as alleging defamation, deprivation of due  
 23 process, retaliation, or all three. (*See id.*)

24           Consequently, because the court addressed Ms. Duke’s due process claim above and will  
 25 address her defamation claims below, it construes counts two and three as alleging First Amendment  
 26 retaliation and will address those claims now.

27       /// /// ///

28       /// /// ///

1            ***ii. The Gravamen of Ms. Duke's First Amendment Retaliation Claims***

2            Ms. Duke's First Amendment retaliation claims arise from two different sets of facts. With  
 3 regard to the first claim, Ms. Duke alleges that Ms. Malloy voted to terminate Ms. Duke—and thereby  
 4 retaliated against Ms. Duke in violation of her First Amendment rights—because Ms. Duke refused  
 5 to pay Parker Malloy for videotaping a City event. (Doc. #49 at 6.) With regard to the second claim,  
 6 Ms. Duke alleges that Mr. Parsons voted to terminate Ms. Duke—and thereby retaliated against her  
 7 in violation of her First Amendment rights—because Ms. Duke refused to “write off” Mr. Parsons’  
 8 water bill. (*Id.*) In response, the City argues that neither Ms. Malloy nor Mr. Parsons retaliated against  
 9 Ms. Duke and, even if they did, Ms. Duke's claims fail as a matter of law. The court agrees.

10            When evaluating a First Amendment retaliation claim by a public employee, the court must  
 11 address a “sequential five-step series of questions:” (1) whether the plaintiff spoke on a matter of  
 12 public concern; (2) whether the plaintiff spoke as a private citizen; (3) whether the plaintiff's protected  
 13 speech was a substantial or motivating factor in the adverse employment action; (4) whether the state  
 14 had an adequate justification for treating the employee differently from other members of the general  
 15 public; and (5) whether the state would have taken the adverse employment action absent the protected  
 16 speech. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). Only if the plaintiff passes the first three  
 17 tests does the burden shift to the City to address the last two tests. *Id.* at 1071-72. Here, Ms. Duke has  
 18 not met her burden of satisfying the first three tests.

19            ***iii. Ms. Duke did not “speak” on a matter of public concern***

20            Regarding the first test, Ms. Duke has not established that she spoke on a matter of public  
 21 concern. “Speech involves a matter of public concern when it can fairly be considered to relate to any  
 22 matter of political, social, or other concern to the community.” *Johnson v. Multnomah County, Or.*, 48  
 23 F.3d 420, 422 (9th Cir. 1995). But, “speech that deals with ‘individual personnel disputes and  
 24 grievances’ and that would be of ‘no relevance to the public’s evaluation of the performance of  
 25 governmental agencies’ is generally not of ‘public concern.’” *Coszalter v. City of Salem*, 320 F.3d  
 26 968, 973 (9th Cir. 2003) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)).

27            Although Ms. Duke is a public official whose speech would normally constitute a public  
 28 concern, the disputes involving Mr. Parsons’ water bill and Parker Malloy’s services are best

1 characterized as personnel disputes or individual grievances. Both concern internal management and  
 2 decision-making. Further, both disputes concern private, individual interests that are of no interest to  
 3 the community at large. Finally, both disputes involve one employee's claim against another. In either  
 4 case, no public interest is at stake. As a result, the court cannot conclude that Ms. Duke's speech  
 5 addressed a matter of public concern.

6 *iv. Ms. Duke spoke as a public employee*

7 Regarding the second test, it is undeniable that Ms. Duke spoke as a public employee and not  
 8 as a private citizen. "Statements are made in the speaker's capacity as citizen if the speaker 'had no  
 9 official duty' to make the questioned statements, or if the speech was not the product of 'performing  
 10 the tasks the employee was paid to perform.'" *Eng*, 552 F.3d at 1071.

11 As the Finance Director and Treasurer, Ms. Duke's responsibilities included issuing bills and  
 12 authorizing expenditures. (Doc. #69 at 24-25.) It is undeniable that both Mr. Parsons water bill and  
 13 Patrick Malloy's request for payment fall under Ms. Duke's duties as a public employee.  
 14 *See supra* pp. 2-3. Therefore, Ms. Duke did not speak as a private citizen.

15 *v. Ms. Duke's speech did not motivate her termination*

16 Regarding the third test, there is not a scintilla of evidence to suggest that Ms. Duke's speech  
 17 was a substantial or motivating factor in her termination. On the one hand, there is no evidence that  
 18 either Ms. Malloy or Mr. Parsons ever contacted, spoke, or communicated with Ms. Duke about Parker  
 19 Malloy's services or Mr. Parsons' water bill. (*See id.*) On the other hand, the record is replete with  
 20 information relating to the City's dearth of financial records and its concern about its excessive debt.  
 21 (Doc. #67 at 3-8.)

22 Attempting to conjure the specter of some unlawful motivation, Ms. Duke promises to  
 23 demonstrate that the City's proffered reasons for Ms. Duke's termination were either false or  
 24 overstated. (Doc. #69 at 26:8.) This argument is meritless. First, a promise to make an argument or  
 25 demonstration is insufficient to survive summary judgment. *See Claar*, 29 F.3d at 504 (quoting  
 26 *Celotex Corp.*, at 477 U.S. 324 ("The non-moving party has the 'burden of advertising [sic] to 'specific  
 27 facts showing that there is a genuine issue for trial . . . ' [I]t is not the district court's job to sift through  
 28 the record to find admissible evidence in support of a non-moving party's case").

1           Second, the veracity of the City's statements is largely irrelevant. The issue is whether  
 2   Ms. Duke's speech regarding Parker Malloy's services and Mr. Parsons' water bill, motivated  
 3   Ms. Duke's termination. The issue is not, as Ms. Duke argues, whether the City's stated reasons are  
 4   false. *See Eng*, 552 F.3d at 1070. Moreover, had Ms. Duke demonstrated that the City's stated reasons  
 5   are both false and were known to be false by the City Council at the time of her termination, which she  
 6   did not, then Ms. Duke would have only adduced circumstantial evidence that her speech could have  
 7   motivated her termination. However, *Eng v. Cooley* requires that the plaintiff demonstrate that her  
 8   speech was a substantial or motivating factor in the adverse employment action. 552 F.3d at 1070.  
 9   Ms. Duke has not made such a showing.

10           ***vi. Conclusion: Ms. Duke's First Amendment retaliation claims fail as a matter of law***

11           In conclusion, Ms. Duke has not satisfied her burden because she has not demonstrated that  
 12   she spoke on a matter of public concern, spoke as a private citizen, or that her speech motivated her  
 13   termination. Even if she had, however, the court notes that the City has likely satisfied its burden with  
 14   regard to *Eng v. Cooley's* final two tests.

15           With regard to the fourth test, the City's legitimate administrative interests in maintaining  
 16   transparent financial records and accountable employees likely "outweigh[s] [Ms. Duke's] First  
 17   Amendment rights." *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004). Whereas the  
 18   cost of opaque financial records appears to have cost the City \$450,000, disregarding Ms. Duke's First  
 19   Amendment rights, which were not, in fact, disregarded, cost Ms. Duke one year's salary. (Doc. #67  
 20   at 8.)

21           With regard to the fifth test, it is highly likely that the City "would have reached the same  
 22   [adverse employment] decision in the absence of the [Ms. Duke's] protected conduct." *Thomas*, 379  
 23   F.3d at 808 (quoting *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 976-77  
 24   (9th Cir. 2002)). Under this test, the Supreme Court has stated that the government may avoid liability  
 25   by showing that the employee's protected speech was not a but-for cause of the adverse employment  
 26   action. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

27           Here, even if Ms. Malloy and Mr. Parsons held a grudge against Ms. Duke, the City has  
 28   demonstrated that Ms. Duke's termination was—at least partially, if not entirely—the result of the

1 City's dire financial circumstances. (See Doc. #67, Ex. 8 at 8-14.) As a result, it is virtually  
 2 impossible for Ms. Duke to demonstrate a but-for relationship between her speech and her termination.

3 Therefore, Ms. Duke's First Amendment retaliation claims fail as a matter of law.

4 ***D. Count Four: Ms. Duke's Defamation Claims Fail as a Matter of Law***

5 Ms. Duke further alleges that the Mayor and City Council caused false and defamatory  
 6 statements to be published in the local news media and to potential employers. (Doc. #49 at 7:15-19.)  
 7 In Nevada, the general elements of a defamation claim require the plaintiff to prove: "(1) a false and  
 8 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a  
 9 third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages."  
 10 *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 90 (2002).

11 Where, as here, the plaintiff is a public official, the United States Supreme Court has clarified  
 12 that "actual malice," rather than mere negligence, must be demonstrated by clear and convincing  
 13 evidence for the plaintiff to prevail. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Actual  
 14 malice means "knowledge that [the statement] was false or with reckless disregard of whether it was  
 15 false or not." *Pegasus*, 57 P.3d at 719 (quoting *New York Times*, 376 U.S. at 280). Reckless disregard  
 16 means that the publisher of the statement acted with a "'a high degree of awareness of . . . [the]  
 17 probably falsity' of the statement or had serious doubts as to the publication's truth." *Id.* (quoting  
 18 *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

19 Once again, however, Ms. Duke's pleadings present a problem. Whereas her complaint  
 20 (Doc. #49) asserts that the Mayor and City Council defamed her during the March 4, 2009, City  
 21 Council meeting, at the February 28, 2012, hearing, Ms. Duke predicated her defamation claim on a  
 22 different set of facts: the March 4, 2009, meeting between Mr. Gransbery and Ms. Malloy.  
 23 (See Doc. #69; Doc. #77.) For the reasons stated below, both of Ms. Duke's defamation claims fail  
 24 as a matter of law.

25 ***i. Ms. Duke's defamation claim relating to the March 4, 2009, City Council meeting***  
 26 ***fails as a matter of law***

27 Ms. Duke alleges that the Mayor and City Council defamed her during the March 4, 2009, City  
 28 Council meeting where Ms. Duke was terminated. (Doc. #49.) Two major problems beset this claim.

1 First, Ms. Duke has failed to provide any evidence—let alone clear and convincing  
2 evidence—that the Councilmembers’ statements were made with actual malice. Rather, relying on  
3 *Chowdry v. NLVH, Inc.*, 851 P.2d 459 (Nev. 1993), Ms. Duke asserts that the malice component is  
4 abrogated when the allegedly false and defamatory statement “tends to injure the Plaintiff in her  
5 business or profession,” even if the plaintiff is a public official. (Doc. #69 at 28:14-24.)

6 This is not true. *New York Times v. Sullivan* and its progeny indubitable stand for the  
7 proposition that actual malice must be demonstrated in defamation actions involving public officials  
8 even if the alleged defamatory statement addresses the plaintiff’s professional reputation.  
9 *See, e.g., New York Times*, 376 U.S. at 279-80 (stating that actual malice must be proven even though  
10 the New York Times published defamatory statements that injured Commissioner L.B. Sullivan’s  
11 professional reputation). Furthermore, Ms. Duke’s reliance on *Chowdry* for the proposition that the  
12 malice component is abrogated when a public official’s professional reputation is injured misreads a  
13 critical fact in the case: *Chowdry* involved a surgeon, not a public official. *See Chowdry*, 851 at 459  
14 (describing plaintiff surgeon’s defamation suit against defendant hospital). In fact, there is no  
15 discussion of public officials in *Chowdry* whatsoever. *Id.*

16 Second, Ms. Duke’s defamation claim fails because every statement made during the March 4,  
17 2009, City Council meeting is absolutely privilege by Nevada Law. N.R.S. § 241.0353(1) provides,  
18 “[a]ny statement which is made by a member of a public body during the course of a public meeting  
19 is absolutely privileged and does not impose liability for defamation or constitute a ground for  
20 recovery in any civil action.” Nev. Rev. Stat. § 241.0353(1) (West 2010). It is undeniable that the  
21 Councilmembers constitute a public body and that their statements, which Ms. Duke alleges to be  
22 defamatory, were made during a public meeting. *See supra* pp. 4-5. Therefore, Ms. Duke’s claim must  
23 fail as a matter of law. *See Chachas v. City of Ely, Nev.*, 615 F. Supp. 2d 1193, 1210 (Nev. 2009)  
24 (granting defendant city’s motion for summary judgment against plaintiff’s defamation claim because  
25 defendant’s statement during a city council meeting that plaintiff was a “damn liar” was absolutely  
26 privileged by N.R.S. § 241.0353(1)).

27 In sum, Ms. Duke’s first defamation claim fails as a matter of law because she has not provided  
28 any evidence that the Councilmembers statements were made with actual malice. Even if she did,

1 however, her claim would fail because the allegedly defamatory statements are absolutely privileged  
2 under N.R.S. § 241.0353(1).

3 *ii. Ms. Duke's alleged defamation claim relating to the March 4, 2009, meeting*  
4 *between Mr. Gransbery and Ms. Malloy fails as a matter of law*

5 Ms. Duke further alleges that Ms. Malloy defamed Ms. Duke during a March 4, 2009, meeting  
6 with Mr. Gransbery. As noted above, Ms. Duke's second amendment complaint does not plead a  
7 defamation claim arising out of Ms. Malloy's March 4, 2009, meeting with Mr. Gransbery.  
8 (See Doc. #49 at 7:15-19.) Nonetheless, in both her opposition to the City's motion for summary  
9 judgment (Doc. #69) and during the February 28, 2012, hearing (Doc. #77), Ms. Duke argued that her  
10 suit should survive summary judgment because the March 4, 2009, meeting between Ms. Malloy and  
11 Mr. Gransbery presents an issue of material fact as to whether Ms. Malloy defamed Ms. Duke. (*Id.*)  
12 This argument fails for several reasons.

13 *a. This claim was not properly pled and is, therefore, barred*

14 First and foremost, it is inappropriate to introduce new arguments and legal theories at the  
15 summary judgment stage. *Colman*, 232 F.3d at 1294. As previously mentioned, parties seeking to  
16 introduce new arguments or theories must comply with Federal Rules of Civil Procedure 16(b) and 15.  
17 See *Johnson*, 975 F.2d at 607-09.

18 Ms. Duke, however, improperly relies on a new argument to avoid summary judgment. Unlike  
19 her second amended complaint, which makes no mention of Mr. Gransbery or Ms. Malloy's March 4,  
20 2009, meeting with him, (*see generally* Doc. #49), Ms. Duke's opposition to the City's motion for  
21 summary judgment predicates her defamation claims on Ms. Malloy's March 4, 2009, meeting with  
22 Mr. Gransbery. (See Doc. #69 at 29 introducing her new defamation claim.) This alone is sufficient  
23 to grant the City's motion for summary judgment with regard to Ms. Duke's second defamation claim.  
24 See *Colman*, 232 F.3d at 1294.

25 Nonetheless, because Ms. Duke argued this claim at length during the March 4, 2009, hearing,  
26 the court will now address the claim on its merits.

27 /// /// ///

28 /// /// ///



b. *Ms. Duke has not adequately argued that Ms. Malloy's statements are defamatory*

This brings the court to the second major problem besetting Ms. Duke's alleged defamation claim: namely, Ms. Duke has not adequately demonstrated that Ms. Malloy's statements were false and defamatory. Rather, Ms. Duke makes unsubstantiated accusations that Ms. Malloy defamed Ms. Duke by accusing Ms. Duke of embezzlement, failing to augment the City's budget, and unlawfully borrowing City funds. (See Doc. #69 at 29:3-11.) Critically, however, Ms. Duke does not attempt to demonstrate that these statements were, in fact, defamatory in nature. Instead, she states that the false and defamatory nature of Ms. Malloy's statements "will be demonstrated" (Doc. #69 at 10:9) and "will be shown." (*Id.* at 11:3.) Such assertions cannot survive summary judgment. As the non-movant, Ms. Duke must respond with evidence setting "out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

c. *Ms. Malloy's alleged statements were not, in fact, defamatory*

In any event, the court notes that Ms. Malloy's statements were not, in fact, defamatory in nature. Under Nevada law, "[a] statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *K-Mart Corp. v. Washington*, 866 P.2d 274, 281-82 (1993) (citing *Las Vegas Sun v. Franklin*, 329 P.2d 867, 869 (1958)). However, a statement is only defamatory if it publishes a statement of fact. See *Posadas v. City of Reno*, 851 P.2d 438, 442 (1993). Statements of opinion are not defamatory and are not actionable. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). When examining whether a statement is defamatory "[t]he words must be reviewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning." *Chowdhry*, 851 P.2d at 463.

The only evidence that Ms. Duke proffers regarding Ms. Malloy's alleged statements is a March 31, 2009, letter (Doc. #67 at Ex. 15) from Mr. Gransbery to Mr. Evangelatos, which memorialized the meeting, and a May 1, 2009, letter (Doc. #70 at Ex. 3) from Susan Fairfield to Mr. Gransbury, which mentioned the meeting. (See also Doc. #69 at 29:9-11 stating that Ms. Duke relies on these letters as evidence of defamation.)

1           However, neither letter records or reiterates Ms. Malloy's statements. (*See* Doc. #67 at Ex. 15.)  
 2       Whereas the first letter reports the subject matters addressed during the meeting (*see id.*), the second  
 3       letter is further removed from the March 4, 2009, meeting and merely responds to financial concerns  
 4       raised by Ms. Malloy during her meeting with Mr. Gransbery. (*See* Doc. #70 at Ex. 3.) As a result,  
 5       the court cannot review Ms. Malloy's statements "in their entirety," as required by *Chowdry*, because  
 6       there is no record of the statements. Accordingly, the court's conclusion whether Ms. Malloy's alleged  
 7       statements were defamatory must rest on the context in which the alleged statements were made.

8           Evidence illuminating the context of Ms. Malloy's alleged statements is provided by the  
 9       March 31, 2009, letter from Mr. Gransbery to Mr. Evangelatos. (Doc. #67 at Ex. 15.) In pertinent  
 10      part, Mr. Gransbery's March 31, 2009, letter states:

11           On March 4th, Councilwoman Kelly Malloy, dropped by my office to discuss some  
 12           issues concerning the financial stability of the City of Fernley. Along with this concern  
 13           Ms. Malloy believed there was considerable mishandling of funds and inaccurate  
 14           reporting by the Finance Director, Bonnie Duke. Ms. Malloy was concerned that the  
 15           City of Fernley met up to seven conditions, listed under N.R.S. § 354.685, which could  
 16           potentially cause the City to come under severe financial emergency. (*Id.*)

17      As preliminary evidence that Ms. Malloy's statements were not defamatory, the court notes that the  
 18      purpose of the meeting was, as the letter states, "to discuss some issues concerning the financial  
 19      stability of the City of Fernley." (*Id.*) That the meeting's purpose—and therefore the *context* of  
 20      Ms. Malloy's alleged statements—was to protect the City's financial stability, and not discuss  
 21      Ms. Duke, has been admitted by Ms. Duke. (*See* Doc. #69 at 27.)

22           In addition to the meeting's purpose, further evidence of the non-defamatory nature of  
 23      Ms. Malloy's statements can be gleaned from Mr. Gransbery's word choice. When memorializing  
 24      his meeting with Ms. Malloy in the March 31, 2009, letter, Mr. Gransbery stated that Ms. Malloy  
 25      "believed" funds had been mishandled and that "she was concerned" that the City could not meet its  
 26      obligations. (Doc. #67 at Ex. 15.) Significantly, neither "beliefs" nor "concerns" are facts.  
 27      *See, e.g., Oxford English Dictionary* (3d ed. 2011) ("belief, *n.*: Acceptance that a statement, supposed  
 28      fact, etc., is true; a religious, philosophical, or personal conviction; an opinion, a persuasion"); *id.*

1 (“concern, *n.*: A matter or subject that affects or touches one, and that ought to engage one’s active  
2 interest and attention”). As established by *Posadas*, such beliefs and concerns are not actionable  
3 because they are not statements of fact. *Posadas*, 851 P.2d at 442.

4 Therefore, the court concludes that Ms. Malloy’s alleged statements were not defamatory in  
5 nature because they were expressions of opinion. *Gertz*, 418 U.S. at 339-40.

6 ***d. Ms. Duke has not established actual malice***

7 The third problem facing Ms. Duke’s alleged defamation claim relating to the March 4, 2009,  
8 meeting between Mr. Gransbery and Ms. Malloy is that Ms. Duke has failed to provide any evidence  
9 that Ms. Malloy’s statements were made with actual malice. Again, Ms. Duke relies on *Chowdry* and  
10 mistakenly asserts that the malice component is abrogated if the allegedly defamatory statement “tends  
11 to injure [a public official] in her business or profession.” (Doc. #69 at 28:14-24.) As discussed  
12 above, *see supra* p. 14, this is not true.

13 ***e. Ms. Malloy’s alleged statements are privileged***

14 Finally, the court notes that Ms. Duke’s alleged statements to Mr. Gransbery during the  
15 March 4, 2009, meeting are privileged. Under Nevada law, “[a] qualified or conditional privilege  
16 exists where a defamatory statement is made in good faith on any subject matter in which the person  
17 communicating has an interest, or in reference to which he has a right or duty, if it is made to a person  
18 with a corresponding interest or duty.” *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 105  
19 (1983) (citing *Scarpelli v. Jones*, 626 P.2d 785 (1981)). “Whether a particular communication is  
20 conditionally privileged by being published on a ‘privileged occasion’ is a question of law for the  
21 court.” *Id.*

22 Here, Ms. Duke alleges that Ms. Malloy, a Councilwoman and fiduciary of the City, defamed  
23 Ms. Duke during a meeting with Mr. Gransbery, who is the supervisor of local government finance  
24 for the Nevada Department of Taxation. (See Doc. #67 at Ex. 15.) Although not briefed by the parties,  
25 the court notes that Ms. Malloy and Mr. Gransbery’s duties and responsibilities correspond insofar as  
26 both Ms. Malloy and Mr. Gransbery have a deep interest in ensuring that the City is financially stable.  
27 It is highly likely, therefore, that Ms. Malloy’s alleged statements during her March 4, 2009, meeting  
28 with Mr. Gransbery are privileged.

1 In conclusion, Ms. Duke's defamation claim relating to Ms. Malloy's March 4, 2009, meeting  
 2 with Mr. Gransbery fails as a matter of law because the claim was not pled in her complaint, Ms. Duke  
 3 did not adequately argue that Ms. Malloy's statements were defamatory, Ms. Malloy's statements were  
 4 not, in fact, defamatory, Ms. Duke has not established actual malice, and Ms. Malloy's alleged  
 5 statements were privileged. Therefore, Ms. Duke's second defamation claim fails as a matter of law.

6 ***E. Counts Five & Six: The City's Alleged Violations of City Ordinances are not Legally***  
 7 ***Cognizable***

8 Finally, the court addresses Ms. Duke's fifth and sixth claims for relief, which allege that the  
 9 City terminated Ms. Duke in violation of two city ordinances. (Doc. #49 at 9-10.) In response, the  
 10 City argues, first, that it did not violate either City ordinance and, second, that the ordinances in  
 11 question do not provide any private cause of action. (See Doc. #67 at 34-36.) The court agrees.

12 The City's power to remove public officials is governed by a series of state statutes and city  
 13 ordinances. Under state law, city officials may be removed by a majority vote of the City Council.  
 14 See Nev. Rev. Stat. § 266.415 (West 2001); Nev. Rev. Stat. § 266.200 (West 2001). The Mayor is  
 15 only entitled to vote in cases of a tie or if the Mayor decides to veto the City Council's decision.  
 16 See Nev. Rev. Stat. § 266.415; Nev. Rev. Stat. § 266.200. The city ordinances governing the removal  
 17 of city officials are substantially similar. City Ordinance 2001-0005 creates the office of City  
 18 Treasurer and provides that the Treasurer "shall hold the office during the pleasure of the Mayor and  
 19 Council." 2001-0005(2)(2). Additionally, City Ordinance 2001-0001, which creates the office of the  
 20 City Manager, provides that the City Manager is "authori[zed]" to "remove all non-elected officers and  
 21 employees of the City except as otherwise provided by law." 2001-0001(4)(A).

22 Ms. Duke contends that her termination was unlawful because the City Council, and not the  
 23 Mayor, City Manager or both, voted for her termination. (Doc. #66 at 7-8.) This argument is  
 24 meritless. First, the City did not violate any statute or ordinance. On March 4, 2009, the City Council  
 25 voted to terminate Ms. Duke by a 3-2 vote. (*Id.*, Ex 8 at 14.) Pursuant to N.R.S. § 266.200, Mayor  
 26 Cutler refrained from voting because there was no tie and, presumably, no reason to veto. Similarly,  
 27 the City Manager refrained from voting because he is not entitled to vote at City Council meetings and  
 28 because his removal power is expressly limited. That is, although 2001-0001(4)(A) empowers the City

1 Manager to remove nonelected officials it also provides that officials may be removed as otherwise  
 2 provided by law. 2001-0005(2)(2) explicitly provides otherwise and outlines the very means the City  
 3 used to terminate Ms. Duke.

4 Second, Ms. Duke's contention that an ordinance was violated because neither the City  
 5 Manager nor Mayor voted ignores the obvious fact that their removal power is not exclusive. There  
 6 is, therefore, no reason to believe either city ordinance was violated.

7 Ms. Duke attempts to evade this obvious and inevitable conclusion by emphasizing, *inter alia*,  
 8 that Ms. Duke held two positions and that the City's reasons for her termination were pretextual.  
 9 (Doc. #69 at 30-32.) In either case, however, neither a state statute nor a city ordinance was violated.  
 10 Ms. Duke, *qua* Finance Director, Treasurer or both, was properly removed. And, even if the City's  
 11 motives were pretextual, the City properly executed its pretext by removing Ms. Duke in accordance  
 12 with the relevant state statutes and city ordinances. Nonetheless, Ms. Duke's assertion is inapposite  
 13 because the City defined the position of City Treasurer and Finance director as a single position.  
 14 *See supra* p. 2.

15 Finally, assuming, *arguendo*, that the City violated either ordinance, Ms. Duke has failed to  
 16 demonstrate the existence of a private right of action. The ordinances contain neither express language  
 17 creating a cause of action nor an implied right of action. *See* 2001-0001; 2001-0005. Moreover,  
 18 Ms. Duke fails to cite to any authority suggesting that the court should infer such a right.  
 19 (*See* Doc. #69 at 30-32.) Rather, she attempts to recast her claim as a due process issue, which, for  
 20 the reasons discussed above, *see supra* pp. 7-8, fails.

21 Therefore, Ms. Duke's fifth and sixth causes of action fail as a matter of law because they are  
 22 not legally cognizable.

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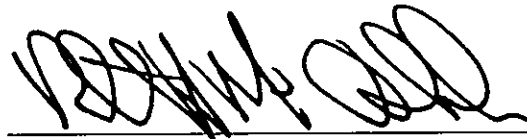
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**IV. CONCLUSION**

For the reasons stated above, Ms. Duke has failed to establish a genuine issue as to any material fact. IT IS THEREFORE ORDERED that Ms. Duke's motion for summary judgment (Doc. #66) is **DENIED** and the City's motion for summary judgment (Doc. #67) is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 21, 2012

A handwritten signature in black ink, appearing to read 'ROBERT A. MCQUAID, JR.', written over a horizontal line.

ROBERT A. MCQUAID, JR.  
UNITED STATES MAGISTRATE JUDGE